

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 259 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAJPUT VIBHUBHAI JETHABHAI

Versus

RIKHAVDAS DHULCHAND SANGHAVI

Appearance:

MR YS MANKAD for Petitioner
SERVED for Respondent No. 1, 2, 3, 4, 5

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 05/03/97

ORAL JUDGEMENT

1. This Second Appeal has arisen from the suit brought by the respondents Nos. 1 to 4 against the appellant and Palitana Municipality for a mandatory injunction ordering removal of cabin erected by the appellant on a foot path forming part of a public street in the area known as Chhella Chakala in Palitana.

2. While admitting Second Appeal the court had formulated substantial questions of law as under :

1. Whether the lease granted by Palitana Municipality to defendant No.1 in 1957 was valid and whether it could be challenged 21 years after it was initially granted ?
2. Whether the suit for a mandatory injunction seeking relief in this behalf is maintainable ?

3. The abovereferred to substantial questions of law arise for the consideration of the court in the background of following facts.

4. Khushal Bhuvan Jain Dharmshala is a public trust. It is registered as a charitable trust under the provisions of the Bombay Public Trusts Act, 1950. The property of the trust is situated on Talati road near Chhella Chakala in Palitana. Nuns and monks belonging to Jain religion are residing in the caravansary. To the north of building of Khushal Bhuvan Jain Dharmshala, there is a public road after leaving foot path having width of 5 feet. To the west of said property also, there is a foot path and then there is a road. On the north west corner of Dharmshala, there is a foot path of Palitana Municipality. Thus, it is a common ground that Khushal Bhuvan Jain Dharmshala is having frontage on two public roads. Earlier a mobile hand lorry was kept by the appellant on the disputed land and a tea stall was being run by him. However, the appellant made an application dated October 30, 1957 to Palitana Municipality to get the land forming part of footpath situated near Khushal Bhuvan Jain Dharmshala on lease. His application was accepted by the Chief Officer of Palitana Municipality who recommended to the Chairman of the Municipality to grant lease of land in favour of the appellant. Accordingly, the Chairman of Palitana Municipality by order dated November 19, 1957 leased the land admeasuring 50 square feet on the foot path adjacent to Khushal Bhuvan Jain Dharmshala to the appellant. It was decided by Palitana Municipality to charge Rs.2/= per month by way of licence fee. The appellant erected wooden cabin and started running tea stall there. The appellant thereafter made sitting arrangement for customers by placing wooden benches and chairs on the foot path. The appellant had also employed 3 to 4 servants for running the tea stall. The customers visiting the tea stall and the servants started causing nuisance to the nuns and monks by uttering filthy abuses.

They started behaving in such a manner that it became difficult for nuns and monks to pursue religious activities peacefully. Moreover, the appellant used to do business till late in the night. According to the plaintiffs, Palitana Municipality had no authority in law to lease part of the foot path to anyone so as to cause obstruction and nuisance in the use of property of Dharmshala which abuts on the foot path and public road. It was the case of the plaintiffs that on inquiry being made the plaintiffs were made to understand by officers of Palitana Municipality that the cabin was permitted to be there for a short period and would be removed within a reasonable time. As the cabin installed by the appellant was not removed, the plaintiffs served notice dated February 8, 1976 to the Municipality calling upon it to remove the encroachment permitted to be made by it on the foot path. On receipt of the notice, Palitana Municipality gave reply but did not take steps to remove the encroachment. Under the circumstances, the respondents Nos. 1 to 4 who are original plaintiffs filed Civil Suit No. 91 of 1976 in the court of learned Civil Judge (J.D.) at Palitana for issuance of prohibitory injunction restraining the appellant from using the land forming part of foot path for running his tea stall and commanding the Municipality to get removed the cabin erected by the appellant on the footpath. The plaintiffs also prayed for mandatory injunction directing the appellant to remove the furniture placed by him on the foot path and restraining him from using any part of the foot path land adjacent to his cabin.

5. The appellant contested the suit by filing written statement at Exh.10. In the written statement, it was pleaded that he was in occupation of land forming part of foot path legally, and, therefore, the plaintiffs were not entitled to get reliefs claimed in the plaint. It was averred in the written statement that no obstruction was caused either to the plaintiffs or to the nuns and monks as claimed in the plaint, and, therefore, the suit was liable to be dismissed.

6. Palitana Municipality resisted the suit by filing written statement at Exh.14. The Municipality in its written statement stressed that suit was barred by time prescribed by the law and no cause of action was available to the plaintiffs against the Municipality. It was pleaded that the appellant was in lawful possession of the land forming part of the foot path, and, therefore, the plaintiffs were not entitled to claim reliefs mentioned in the plaint. It was also claimed

that the suit filed by the plaintiffs without obtaining permission from Charity Commissioner as required by the provisions of the Bombay Public Trusts Act, 1950 was not maintainable and was liable to be dismissed.

7. Having regard to the pleadings of the parties, the learned Judge of the trial court framed three issues for determination. After considering the oral and documentary evidence adduced by the parties, the trial court held that the prayer to direct the appellant to remove cabin installed on foot path was liable to be rejected as it suffered from delay and latches. After negativing the claim advanced by the original defendants that the suit was barred by time prescribed by law, the trial court held that the plaintiffs were entitled to get permanent injunction to restrain use of land other than the land admeasuring 50 square feet by the appellant. The trial court also deduced that the appellant had made encroachment on the land forming part of foot path over and above the land admeasuring 50 square feet which was illegal. In view of these conclusions, the trial court partly decreed the suit of the plaintiffs by judgment and order dated February 28, 1978. The trial court issued permanent injunction restraining the appellant from using the foot path land except land admeasuring 50 square feet on which the suit cabin was erected. A direction to remove all furniture lying on the foot path land and not to use any other part of foot path adjacent to cabin was also issued.

8. Feeling aggrieved by the abovereferred to judgment and decree, the original plaintiffs preferred Regular Civil Appeal No.58 of 1978 in the District Court at Bhavnagar. The learned Assistant Judge, Bhavnagar, who heard the appeal considered the law on the point and held that Palitana Municipality had no right or authority to lease land forming part of foot path to the appellant. In that view of the matter, the first appellate court allowed the appeal by judgment and decree dated March 26, 1979 and granted relief of mandatory injunction in favour of original plaintiffs ordering the original defendants to remove suit cabin and restore the footpath to its original position, giving rise to the present appeal.

9. Mr.Y.S.Mankad, learned counsel for the appellant submitted that Palitana Municipality had granted lease in favour of the appellant in the year 1957, and, therefore, the suit ought not to have been decreed against the appellant by the first appellate court. It was pleaded that as the foot path was never a part of public street, the plaintiffs were not entitled to file the suit for

permanent injunction against the appellant, and, therefore, the impugned judgment deserves to be reversed. Lastly it was argued that the suit was barred by limitation in view of the provisions of Section 253 (1) of the Gujarat Municipalities Act, 1963, and, therefore, the Second Appeal should be allowed.

10. In my view, there is no substance in any of the contentions raised on behalf of the appellant and the Second Appeal deserves to be dismissed. On appreciation of oral and documentary evidence produced by the parties, the trial court as well as the first appellate court which is final court of fact have concurrently found that the appellant was permitted to keep mobile hand lorry on land forming part of the foot path. The question whether place where the appellant was permitted to keep mobile hand lorry is a place forming part of foot path or not is essentially a question of fact and not liable to be interfered with in the Second Appeal. The said finding is not contrary to the evidence led by the parties. It is not the case of the appellant that while recording finding of fact to the effect that the appellant was permitted to use part of land forming foot path to enable him to keep mobile hand lorry, relevant evidence adduced on behalf of the appellant or Municipality is ignored by the courts. Under the circumstances, the finding that the appellant was permitted to use land forming part of foot path is eminently just and is hereby confirmed.

11. The evidence led by the parties proves it beyond any controversy that wooden pillars for the cabin were inserted in the ground and on those pillars the wooden cabin admeasuring 8 feet X 25 feet was erected by the appellant. The benches and chairs were also placed near the cabin on the foot path to enable the customers to sit. It is an admitted position that near the cabin, there are two doors of rooms of Khushal Bhuvan Jain Dharmshala which is being used as caravansary and adjacent to the said caravansary, there are 8 other rooms which are also being used for the purpose of the trust. The building of the Dharmshala exists since many years and there has not been any change in the road or foot path since years. The appellant was permitted to keep mobile hand lorry by the Municipality on licence basis. The evidence on record shows that due to the erection of cabin, doors and windows abutting on the foot path had to be kept closed. The customers visiting the tea stall installed by the appellant as well as servants employed by the appellant created nuisance to the occupants of the caravansary. The record also shows that there is heavy traffic on the road. In the light of these proved facts

the question whether Palitana Municipality has right to lease land forming part of foot path to the appellant has to be considered. The learned counsel for the appellant has failed to point out any provision of law which enables the Municipality to lease out land forming part of footpath or public street to a citizen. The Municipality has no legal authority to permit anyone to cover up portion of a foot path nor can it permit anyone to occupy part of the foot path by leasing it out merely on the specious plea that the street and/ or the foot path vests and belongs to the Municipality. If the Municipality permits a citizen to cover portion of a foot path which causes obstruction to the adjacent owner or occupant of the property, the owner or as the case may be the occupant is entitled to maintain an action for mandatory injunction against the Municipality as well as against the person who is permitted to cover up portion of a foot path for removal of obstruction and/or nuisance. The owner of an adjoining property has a right of access to the public street on all points on his boundaries and the access cannot be restricted to any particular point. He has a right to have the obstruction removed irrespective of the fact that he has an ingress and egress on the road from other places in his property. The Municipality can exercise the rights over the street and foot path in the manner and to the extent authorized by Gujarat Municipalities Act, 1963 and in the absence of anything in the Act to empower the Municipality to permit a person to cover up a portion of the street or foot path by putting up a permanent structure thereon, the action of the Municipality cannot be justified at all. On appreciation of evidence, the first Appellate Court has recorded a finding that after obtaining permission from the Municipality to keep mobile hand lorry, the appellant had constructed a permanent structure on the land forming part of foot path. As observed earlier, the plaintiffs have proved obstruction to the use of the property belonging to the trust and nuisance being caused to the occupants of caravansary. Therefore, no exception can be taken to the injunction granted by the first Appellate Court. On the facts and in the circumstances of the case, I am of the opinion that lease granted by Palitana Municipality to the appellant in the year 1957 was null and void ab initio and the plaintiffs were entitled to challenge the action of Palitana Municipality even after lapse of long time. Before filing the suit, the plaintiffs had served notice to the Municipality as required by Section 253 of the Gujarat Municipalities Act, 1963. The nuisance and obstruction caused by the appellant is a continuing wrong and therefore, the period of limitation prescribed by Section 253 of the Gujarat

Municipalities Act, 1963 has no application to the facts of the case. Even otherwise a void order does not require to be set aside by initiating proceedings within the time prescribed by law. It is a fundamental principle that an order passed without jurisdiction is a nullity and its invalidity can be set up whenever and wherever it is so sought to be enforced or relied upon. The order granting land forming part of footpath to the appellant on lease/licence basis was a nullity and void ab-initio. Under the circumstances the bar created by Section 253 of the Gujarat Municipalities Act, 1963 is not attracted to the facts of the case at all. It is relevant to note that Palitana Municipality has neither challenged decree passed by the first appellate court nor pressed into service the so called bar created by Section 253 of the Municipalities Act. As the lease granted by the Palitana Municipality in favour of the appellant was void ab initio and as the appellant had caused obstruction and nuisance, suit for mandatory injunction directing the defendants to remove the suit cabin and make foot path open was/is maintainable. Therefore, the first substantial question of law formulated by the court is answered accordingly and against the appellant. The second substantial question of law is answered in affirmative and against the appellant.

12. For the foregoing reasons, I do not find any substance in Second Appeal and it is liable to be dismissed. The Second Appeal therefore, fails and is dismissed. However, there shall be no order as to cost. Stay of execution of decree passed by the first appellate court, if any, hereby stands vacated.

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